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No. 94-1404

In the Supreme Court of the United States

OCTOBER TERM, 1994

AMIR JAMES ATTAR AND PERFECT VIEW, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners' request for a continuance of the sentencing hearing after the court had permitted petitioners' attorneys to withdraw as defense counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 38 F.3d 727.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1994. A petition for rehearing was denied on November 23, 1994. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on February 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners pleaded guilty in the United States District Court for the Eastern District of North Carolina to two counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Attar was sentenced to 41 months' imprisonment and was fined $75,000. Petitioner Perfect View, Inc., was sentenced to three years' probation and was fined $250,000. Petitioners also were ordered to pay $120,000 in restitution. The court of appeals affirmed. Pet. App. 1a-15a.

1. Petitioner Attar is a chemical engineer who was the president and majority owner of petitioner Perfect View, Inc. (PVI), a research-and-development company that held research contracts with the government between 1987 and 1991. Pet. App. 2a. In 1991, government investigators discovered that PVI had mischarged thousands of hours of labor on its government contracts. Petitioner Attar directed PVI employees to falsify time sheets, which then were incorporated into claims submitted to the United States. PVI mischarged the government for work performed for another company owned by petitioner Attar and billed government contracts for which funds were available for work done on contracts for which funding had expired. Gov't C.A. Br. 6-7; C.A. App. 233-238.

An indictment returned in 1992 alleged that petitioners had defrauded the government by submitting false claims for payment in connection with PVI's government contracts. The indictment charged petitioners with 22 counts of mail fraud, in violation of 18 U.S.C. 1341; 23 counts of making false claims upon the United States, in violation of 18 U.S.C. 287; and 150 counts of making false statements

in a matter within the jurisdiction of the United States, in violation of 18 U.S.C. 1001. Petitioners retained two attorneys to represent them in connection with those charges. Pet. App. 2a; Gov't C.A. Br. 7-8.

Thereafter, petitioners entered into a plea agreement with the government, under which they agreed to plead guilty to two counts of mail fraud, to pay $120,000 in restitution, and to forfeit certain property. In exchange, the government agreed to dismiss the remaining counts of the indictment, to make no recommendation as to petitioners' sentence, and to stipulate that its loss was limited to $120,000. Pet. App. 2a-3a.

Petitioners entered their guilty pleas on March 9, 1993. C.A. App. 50. Before accepting petitioners' pleas, the district court engaged in a lengthy colloquy with petitioner Attar, as representative of both himself and petitioner PVI. Pet. App. 3a; C.A. App. 51-62. During the exchange, petitioner Attar acknowledged that he was "in fact guilty as charged" in the two mail fraud counts to which he was entering guilty pleas. C.A. App. 62. At the conclusion of the colloquy, the district court accepted petitioners' guilty pleas, finding that they were being entered "freely and voluntarily" and that they were "supported by an independent basis in fact." Pet. App. 3a; C.A. App. 62. The court scheduled petitioners' sentencing for July 12, 1993. C.A. App. 62.

Shortly before the scheduled sentencing date, petitioners moved to continue the sentencing, based on their counsel's vacation plans and need for more time to prepare objections to the presentence report. Pet. App. 3a; C.A. App. 72-73. The district court granted the motion and rescheduled the sentencing for August 23, 1993. Pet. App. 3a-4a; C.A. App. 75.

On August 18, 1993, five days before the scheduled sentencing, petitioners' attorneys filed a motion to withdraw as defense counsel, together with a motion to continue the sentencing hearing. The motion stated that the attorneys had a "substantial and irreconcilable" conflict with petitioner Attar and that their continued representation of petitioners would violate applicable ethical rules. In addition, the motion stated that petitioner Attar had informed his counsel that day that petitioners wished to withdraw their guilty pleas. The motion stated that petitioners had "lost faith" in their attorneys and requested the court to continue the sentencing in order to allow petitioners to retain other counsel. Pet. App. 4a; C.A. App. 78-80. The district court denied the attorneys' motion to withdraw and the motion for a continuance and ordered petitioners to appear for sentencing as scheduled. Pet. App. 4a; C.A. App. 82.

At the sentencing hearing, petitioners' counsel renewed their motion to withdraw from their representation of petitioners. When the district court asked petitioner Attar whether he wanted the attorneys to continue to represent him, petitioner responded that he was not guilty, that he had pleaded guilty to protect members of his family, and that he wanted time to retain new counsel to assist him in presenting a motion to withdraw his guilty plea. Pet. App. 4a; C.A. App. 85-87. The district court told petitioner Attar that it would not permit him to withdraw his plea and that "[y]ou are going to be sentenced today." Pet. App. 4a-5a; C.A. App. 87. The court then told petitioner Attar that he needed to choose between going forward with his current counsel, representing himself alone, or representing himself with current counsel as standby counsel.

Pet. App. 5a; C.A. App. 87. Petitioner responded by stating that he was "not really prepared right now to present argument as to why I've done what I've done and why I feel that justice is not done * * * by this plea or by this sentence." Pet. App. 5a; C.A. App. 88. The court repeated that it was not going to allow petitioner Attar to withdraw his guilty plea and again asked him to decide whether he wanted to be represented by his current counsel at the sentencing hearing or to represent himself, with or without current counsel as standby counsel. Pet. App. 5a; C.A. App. 88.

At this point, petitioner Attar asked to confer with one of the defense attorneys, and the court allowed him to do so. Pet. App. 5a; C.A. App. 88. The attorney then addressed the court, explaining that defense counsel had prepared a sentencing memorandum outlining their objections to the presentence report, but that petitioner Attar had informed them that the positions they took in the memorandum "were incorrect because he was not guilty." Pet. App. 5a, 12a; C.A. App. 89. The attorney stated that petitioner Attar "has told us that he wanted to remove us as counsel for various reasons, and I don't want to get into all of that for fear of prejudicing somebody." Pet. App. 5a, 12a; C.A. App. 89. After hearing the attorney's remarks, and without any further discussion with petitioner Attar, the court stated that the two attorneys were "allowed to withdraw as regular counsel" but ordered them to serve as standby counsel during the sentencing hearing. Pet. App. 5a; C.A. App. 90.[1]

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[1] The court permitted the attorneys to file, under seal, the sentencing memorandum they had prepared on behalf of

The district court then proceeded with the sentencing hearing. Observing that the government "has the burden of proving all of those factors which would be applicable in establishing the guideline range," the court required the government to "go forward with its evidence." Pet. App. 5a-6a; C.A. App. 92. The government called as a witness a government auditor who summarized the evidence supporting the offense conduct and guideline applications contained in the presentence report. Pet. App. 6a; C.A. App. 93-193. Petitioner Attar declined to cross-examine the government's witness or to present any evidence, stating that he lacked the "documentation to do it now" and that he was "simply * * * not prepared." Pet. App. 6a; C.A. App. 193-195, 200-201.

The district court adopted the factual findings and proposed applications of the Sentencing Guidelines contained in the presentence report. Pet. App. 6a; C.A. App. 201. After applying all of the upward adjustments to which petitioners' former counsel had objected in their sentencing memorandum, the court sentenced petitioner Attar at the top of the applicable Sentencing Guidelines range. Pet. App. 6a; C.A. App. 208-209.

2. In the court of appeals, petitioners, represented by new counsel, contended that the district court

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petitioners before their withdrawal. Pet. App. 5a; C.A. App. 90. The memorandum objected to several upward adjustments in petitioner Attar's offense level that had been recommended in the presentence report, including adjustments for his having engaged in more than minimal planning, for his role in the offense, and for his abuse of a position of trust. C.A. App. 339-351. The memorandum also objected to the report's recommendation that petitioner Attar not receive an offense level reduction for acceptance of responsibility. *Id.* at 352-353.

improperly denied them the effective assistance of counsel by requiring them to represent themselves during the sentencing hearing. The government responded that the district court had properly found that petitioners made a valid waiver of the right to counsel. Pet. App. 10a-11a.

The court of appeals rejected the government's view of the district court's action, observing that "[t]he district court was evidently convinced that [the attorneys] could not represent Attar, ethically and effectively, at sentencing once Attar denied them permission to acknowledge his guilt." Pet. App. 13a. Thus, the court stated, the government's contention that the district court had properly accepted petitioners' waiver of counsel was "mistaken." *Ibid.*

The court of appeals reasoned that the question raised by petitioners' Sixth Amendment claim was "not whether Attar waived his right to counsel * * * but whether the district court erred in simultaneously granting counsels' motion to withdraw and denying Attar's motion for a continuance." Pet. App. 13a. The court had "no doubt that the district court acted well within its authority in granting [the attorneys'] motion to withdraw." *Ibid.*

The court also upheld the district court's refusal to continue the sentencing hearing, explaining that "a district court need not grant a continuance for purposes of securing new counsel where the request for it plausibly can be viewed as simply a delaying tactic or as otherwise unreasonable." Pet. App. 14a. The court reasoned that in this case the district court could properly find that petitioner Attar's "belated creation * * * of an inextricable ethical predicament for his counsel constitutes a plausible

basis for exercising discretion to deny a continuance to secure new counsel after allowing former counsel to withdraw." *Ibid.* "Such conduct," the court stated, "can properly be viewed as a constructive discharge of counsel undertaken for dilatory or unreasonable purposes." *Ibid.* The court concluded that "given the facts that Attar's about-face occurred just a few short days before sentencing, that sentencing had already been continued once (for nearly six weeks) at the defendants' request, and that the defendants' attempt to withdraw their facially valid guilty pleas faced precious little, if any, prospect of success," the district court had not abused its discretion in refusing to grant a continuance. *Id.* at 14a-15a.

ARGUMENT

Petitioners renew their claim (Pet. 8-19) that the district court erred in denying their request for a continuance of the sentencing hearing after allowing their counsel to withdraw.

"[B]road discretion must be granted trial courts on matters of continuances," *Morris* v. *Slappy*, 461 U.S. 1, 11 (1983), and "not every denial of a request for more time * * * violates due process even if the party * * * is compelled to defend without counsel." *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). While a "myopic insistence upon expeditiousness in the face of a justifiable request for delay" may implicate due process concerns, "[t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case." *Ibid.*; see also *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940).

The courts of appeals have held that a district court may properly exercise its discretion to deny a defendant's request for a continuance to obtain new counsel when the court determines that the defendant is "manipulating his constitutional right to counsel in an effort to effect delay." *United States* v. *Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987); see also, *e.g.*, *United States* v. *Harris*, 2 F.3d 1452, 1455 (7th Cir.), cert. denied, 114 S. Ct. 481 (1993); *United States* v. *Fazzini*, 871 F.2d 635, 642 (7th Cir.), cert. denied, 493 U.S. 982 (1989); *Meyer* v. *Sargent*, 854 F.2d 1110, 1113, 1115 (8th Cir. 1988); *McQueen* v. *Blackburn*, 755 F.2d 1174, 1178 (5th Cir.), cert. denied, 474 U.S. 852 (1985). Cf. *Morris* v. *Slappy*, 461 U.S. at 13 (trial court did not abuse its discretion in denying defendant's request for continuance where court reasonably could have concluded that defendant's "belated requests" to be represented by different attorney "were not made in good faith but were a transparent ploy for delay").

Petitioners acknowledge that principle (Pet. 11-12, 14), but they assert (Pet. 13) that this is not "the type of extreme case in which a court would be justified in finding that a defendant was manipulating his right to counsel to delay proceedings." Petitioners' fact-bound claim that the district court did not properly exercise its discretion in the particular circumstances of this case does not warrant this Court's review. Because this Court has held that the question whether the denial of a continuance violates due process cannot be answered by reference to "mechanical tests," but "must be found in the circumstances present in every case," *Ungar* v. *Sarafite*, 376 U.S. at 589, there is no basis for petitioners' suggestion (Pet. 14-16) that this Court should grant review to establish a "set standard"

for courts to apply when dealing with "obstinate defendants."[2]

The district court acted within its discretion in denying petitioners' request for a continuance of the sentencing hearing based on petitioner Attar's "belated creation * * * of an inextricable ethical predicament" for his attorneys. Pet. App. 14a. Petitioner Attar entered his own guilty plea and one on behalf of petitioner PVI on March 9, 1993, after "an extensive Rule 11 colloquy" (C.A. App. 87) at which Attar acknowledged that he was "in fact guilty as charged" (*id.* at 62). Although sentencing originally was set for July 12, 1993, petitioner sought and

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[2] The decision below does not conflict with any of the cases cited by petitioners (Pet. 11). Those cases generally establish the proposition that a district court may abuse its discretion if it fails to conduct adequate inquiry into the reasons for a defendant's desire to obtain new counsel. See *Hendricks* v. *Zenon*, 993 F.2d 664, 668, 670-671 (9th Cir. 1993) (no inquiry conducted into defendant's motion to substitute counsel; recognizing that dilatory conduct to delay proceedings may justify requiring defendant to proceed pro se); *United States* v. *Silkwood*, 893 F.2d 245, 249 (10th Cir. 1989) (court failed to make sufficient inquiry to ensure that defendant "was not forced to make the Hobson's choice * * * between incompetent or unprepared counsel and appearing *pro se*"), cert. denied, 496 U.S. 908 (1990); *McMahon* v. *Fulcomer*, 821 F.2d 934, 944 (3d Cir. 1987) ("total absence of any inquiry" into cause of defendant's dissatisfaction with counsel); *United States* v. *Welty*, 674 F.2d 185, 190 (3d Cir. 1982) (same); see also *United States* v. *Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987) (finding clearly erroneous the district court's determination that request for change in counsel was an intentional delaying tactic). In this case, the statements of petitioner Attar and his defense counsel were sufficient to apprise the court of the basis for petitioners' motion to substitute counsel, *i.e.*, petitioner Attar's eleventh-hour claim of innocence.

received a continuance until August 23, 1993. It was not until August 18, 1993—five days before the continued sentencing date and more than five months after the entry of his guilty plea—that petitioner asserted his innocence and indicated a desire to withdraw his facially valid plea, a motion that under the circumstances "faced precious little, if any, prospect of success." Pet. App. 14a.

At the sentencing hearing, the district court repeatedly offered petitioner Attar a choice between proceeding pro se, proceeding with his current counsel, or proceeding with his current counsel as standby counsel. C.A. App. 87, 88. Despite the court's warnings that petitioners were "going to be sentenced today" (*id.* at 87), petitioner Attar refused to respond directly to the court's inquiry about whether he wished to represent himself. Finally, after conferring with petitioner Attar, the defense attorney stated that petitioner "wanted to remove us as counsel for various reasons." *Id.* at 89. As the court of appeals held, the district court could properly find on this record that petitioner Attar's conduct was "a constructive discharge of counsel undertaken for dilatory or unreasonable purposes." Pet. App. 14a.[3]

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[3] Petitioners contend (Pet. 17-19) that the court of appeals improperly usurped the fact-finding role of the district court because the district court never found that petitioners intentionally created the conflict with their counsel to delay the sentencing. The district court's statements at the sentencing hearing, however, make clear that the court viewed petitioner Attar's sudden insistence on obtaining new counsel as a ploy to delay the proceedings, given that petitioner had "elected to plead guilty" after "an extensive Rule 11 colloquy" (C.A. App. 87), and that sentencing already had been continued once for "quite some time," thus giving petitioner

Even if another trial judge could have reached a different conclusion, "the fact that something is arguable does not make it unconstitutional." *Ungar* v. *Sarafite*, 376 U.S. at 591. There is no need for this Court to reexamine the court of appeals' conclusion that the district court permissibly exercised its discretion to deny petitioners' request for a continuance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1995

"more than ample time * * * to prepare for sentencing" (*id.* at 86, 87).